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In The

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DELAWARE DIRECTOR OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Delaware Wholesale Merchants' License Tax, 30 Del. C. §2902, as applied to the wholesaling activity of Ford Motor Company ("Ford"), is fairly apportioned under the Commerce Clause of the Constitution of the United States when Ford engages in regular, systematic solicitation of dealers in Delaware, delivers the vehicles sold to dealers into the State and requires dealers to engage in other business practices designed to boost Ford's sales and when only gross receipts from sales of goods physically delivered to dealers are taxed.

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STATEMENT OF JURISDICTION

The Supreme Court of the State of Delaware (the "Delaware court") entered judgment on December 8, 2008. On January 13, 2009 it denied Petitioner's motion for rehearing *en banc*. On April 2, 2009, Justice Souter granted Petitioner an extension of time within which to file a petition for a writ of certiorari to and including May 13, 2009. Petitioner filed its Petition for a Writ of Certiorari on May 13, 2009 (the "Petition"), and the Court placed the Petition on the docket on May 18, 2009.

This Court's jurisdiction is properly invoked under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

Introduction

The sole issue in this case is whether the Delaware Wholesale Merchants' License Tax, 30 Del. C. §2902, (the "Wholesalers' Tax"), as applied to the wholesaling activity of Ford Motor Company ("Ford") in selling and delivering vehicles to automobile dealers in Delaware, is fairly apportioned under the Commerce Clause of the Constitution of the United States, U.S. Const. art. I, §8, cl. 3, as interpreted by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and its progeny. More specifically, the question is whether the Wholesalers' Tax meets the "external consistency" test for fair apportionment set forth in *Container Corporation of*

America v. Franchise Tax Board, 463 U.S. 159, 169-170 (1983), and other cases decided by this Court. The Delaware court, applying well established dormant Commerce Clause principles from *Complete Auto Transit* and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), and the external consistency principles in *Container Corporation*, held that the Wholesalers' Tax meets the external consistency test and, therefore, that it is fairly apportioned. No review of the decision of the Delaware court is required because the Delaware court's analysis is in harmony with the decisions of this Court, and does not conflict with the holdings of the highest courts of various States in the cases cited by Petitioner.

Delaware's Wholesalers' Tax

The Wholesalers' Tax applies to "[a]ny person desiring to engage in business in [Delaware] as a wholesaler. . . ." 30 Del. C. §2902(b). The tax consists of a flat $75 annual fee, plus a percentage of the "aggregate gross receipts attributable to sales of tangible personal property *physically delivered within [Delaware]*. . . ." *Id.* at §2902(b) & (c)(1) (emphasis supplied). A wholesaler is "[e]very person engaged . . . in the business of selling to or exchanging with another person goods . . . for the purpose of resale by the person acquiring the goods sold or exchanged. . . ." *Id.* at §2901(11)a.1. Thus, the Wholesalers' Tax is a gross receipts tax on the activity of wholesaling in Delaware. Ford agrees that it fits the definition of

"wholesaler". *Ford Motor Company v. Director of Revenue*, 963 A.2d 115, 119 (Del. 2009) (Petitioner's App. at 7a).

The Wholesalers' Tax uses a "destination test" to determine taxable and non-taxable gross receipts. The tax is imposed on gross receipts constituting "total consideration received from sales of tangible personal property *physically delivered within this State to the purchaser or purchaser's agent. . . .*" 30 Del. C. §2901(4)b (emphasis supplied). The statute also provides that "the term 'physically delivered within this State' includes delivery to the United States mail or to a common or contract carrier for shipment to a place within this State irrespective of F.O.B. or other terms of payment for delivery." *Id.* at §2901(7). In contrast, gross receipts from goods delivered outside of the State or delivered in Delaware to the mail or a common or contract carrier for shipment outside of Delaware are not taxable. *Id.* at §2901(4)b(i); *KMC Foods, Inc. v. Director of Revenue*, 2002 WL 31028797 (Del. Super. Ct. 2002), *aff'd w/o pub. opin.*, 815 A.2d 348 (Del. 2003).

Ford's Wholesaling Activities

Ford is a Delaware corporation headquartered in Michigan that manufactures and sells motor vehicles and motor vehicle parts. *Ford Motor Company*, 963 A.2d at 117 (Petitioner's App. at 3a). All manufacturing activity takes place outside of Delaware. *Id.* Ford sells vehicles and parts to eleven independent

dealers in Delaware for resale to the dealers' retail customers. *Id.* After a forecasting process and development of a sales plan for each dealership based on Ford's production and the dealers' likely needs, Ford District and Zone Managers in its sales division make frequent visits from their offices in New Jersey and Virginia to each Delaware dealer at its dealership in order to persuade the dealer to commit to buying certain models and quantities of Ford vehicles. *Id.*

Ford also engages in other practices to boost sales to Delaware dealers. It enters into a Sales and Service Agreement with each dealer that imposes significant requirements on the dealers' conduct of business that are designed to enhance the Ford brand and both vehicle and parts sales. *Id.* This agreement binds the dealers to certain sales practices and inventory requirements, the performance of warranty and other service work on Ford vehicles, the display of signage and the use of Ford trademarks. *Id.* (Petitioner's App. at 3a-4a). Ford also engages in extensive national advertising campaigns and sales promotional activities and contributes to local dealer advertising funds, all of which contribute to sales to Delaware dealers. *Id.* at 117 (Petitioner's App. at 3a).

Ford strictly controls the delivery process as part of its wholesaling activity because the dealers are contracting for vehicles to be delivered to their lots in Delaware in condition to be sold as new. *Id.* at 122 (Petitioner's App. at 14a). Ford's control of vehicle shipment to the dealer is necessary to ensure that

vehicles arrive in pristine condition. Del. Supr. Ct. App. A139-140. After assembly outside of Delaware, Ford ships vehicles by rail from the assembly plant to a "mixing center" in Ohio for sorting, then further by rail to "destination ramps" in Maryland or Pennsylvania for re-sorting, then by truck to dealers. *Id.* at 118 (Petitioner's App. at 4a). Ford or its contract logistics provider, not the Delaware dealer, hires and oversees the performance of its contract rail and truck carriers from its "drop zone" at the assembly plant through rail transport, sorting, re-transport and the unloading of vehicles from trucks at the dealer's premises. *Id.* at 118, 122 (Petitioner's App. at 4a, 14a); *see also* Del. Supr. Ct. App. A26-27, A109, A187, A189 & A195-200. Ford, not the Delaware dealers, makes payment to the carriers. *Ford Motor Company*, 963 A.2d at 117 (Petitioner's App. at 4a); *see also* Del. Supr. Ct. App. A29-30. The dealers' contact with Ford's distribution chain occurs only upon delivery at the dealership in Delaware, when dealers inspect the vehicles and accept or reject them. Del. Supr. Ct. App. A30, A199-200; A310-312.

Although title to the vehicles passes technically to the dealers at the manufacturing plant, Ford continues to bear financial risk for the vehicles until delivery at the dealers' premises. *Ford Motor Company*, 963 A.2d at 118, 122 (Petitioner's App. at 4a-5a, 14a). Ford bears the cost of repairing vehicles damaged in transit or of procuring insurance from its captive insurance subsidiary against such damage

(naming itself as loss payee), and it bears responsibility for manufacturing defects. *Id.*; *see also* Del. Supr. Ct. App. A109-110 (Stipulation ¶21), A287-288 (Sales and Service Agreement §11(c)), A313 (Warranty Manual p.2-8). For damage in transit over $501 per vehicle, Ford does not permit the vehicle to be sold as new, repurchases the vehicle from the dealer and takes charge of disposing of it. *Ford Motor Company*, 963 A.2d at 118.

REASONS FOR DENYING THE PETITION

I. Review Is Not Necessary In This Case, Because The Decision Of The Delaware Court Is Consistent With This Court's Decisions On Apportionment of Gross Receipts Taxes On Sales Of Goods.

The Wholesalers' Tax is consistent with this Court's decisions on the apportionment of gross receipts taxes on interstate sales of goods. *See Tyler Pipe*, 483 U.S. 232 (1987); *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975). The tax is fairly apportioned because a gross receipts tax that reaches only gross receipts from wholesale sales of goods delivered into a State is fairly apportioned within the meaning of *Complete Auto Transit*, 430 U.S. 274 (1977), and its progeny, regardless of whether the tax base is divided, as is the Wholesalers' Tax, by a destination test or by single sales factor formula apportionment. In *Complete Auto Transit*, the Court began to ignore formalistic

statutory drafting differences and focused instead on the practical effects of the tax. 430 U.S. at 279; *see also Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 180-183 (1995) (historical summary of cases before *Complete Auto Transit*). The Delaware court recognized and applied this principle in its decision below. It held that the Delaware tax passed the external consistency test because "the Wholesalers' Tax is not 'out of all appropriate proportion to the business transacted' in this state, nor is the result 'grossly disproportionate.'" *Ford Motor*, 963 A.2d at 122 (*quoting Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169-170 and *Moorman Manufacturing Company v. Bair*, 437 U.S. 267, 272 & 274 (1978) (Petitioner's App. 9a)). Accordingly, the Delaware court held that the Wholesalers' Tax was externally consistent and fairly apportioned.

The purpose of the fair apportionment requirement is to ensure that a state taxes only its fair share of interstate activity. *See, e.g., Jefferson Lines*, 514 U.S. 175, 184 (1995); *Goldberg v. Sweet*, 488 U.S. 252, 260-261 (1989). This Court has held consistently that States enjoy wide latitude in determining how to divide the tax base to achieve this purpose, and this Court has on several occasions declined to require a specific method of doing so. *Moorman Manufacturing Company v. Bair*, 437 U.S. 267, 274 (1978); *accord Jefferson Lines*, 514 U.S. at 195; *Goldberg*, 488 U.S. at 261; *Container Corporation*, 463 U.S. 164 (1983). The Court will not invalidate a fairly apportioned tax

simply because its method of dividing the tax base varies from a prevailing approach adopted by other states. *Container Corporation*, 463 U.S. at 171 (discussing *Moorman*, 437 U.S. at 278-280).

Ford argues that the Delaware court's decision, as well as the decisions of this Court in *Tyler Pipe* and *Standard Pressed Steel,* cannot be reconciled with its decision in *Jefferson Lines*. This argument proves too much; the Court cited *Tyler Pipe* in the *Jefferson Lines* opinion without criticism. It also cited with approval a case that Ford does not cite in the Petition: *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978). *Jefferson Lines*, 514 U.S. at 186. In *Moorman*, this Court held that an income tax was fairly apportioned. The tax in *Moorman* used a single sales factor apportionment formula that produces a division of the tax base equivalent to the destination test in the Wholesalers' Tax. Indeed, the Court in *Moorman* noted the similarity, as it did again in *Tyler Pipe*, 483 U.S. 251.

In *Jefferson Lines*, 514 U.S. 175 (1995), the Court analyzed a retail sales tax on bus tickets sold for transportation services rendered in more than one State. In holding that the sales tax was fairly apportioned, the Court distinguished the sales tax from gross receipts taxes, which it had previously treated as a variety of income tax. *Id.* at 190 (discussing *Central Greyhound Lines, Inc., of New York v. Mealey*, 334 U.S. 653 (1948) (requiring mileage apportionment of gross receipts from interstate bus ticket sales). In its discussion of the

external consistency test, the Court wrote that "The very term 'apportionment' tends to conjure up allocation by percentages . . ."; however, the Court did not hold that formula apportionment was required in order for a gross receipts tax to be fairly apportioned. *Jefferson Lines,* 514 U.S. at 186. Rather, it held only that a State must fashion its tax to reach only its fair share of an interstate transaction, *i.e.,* that part of value fairly attributable to economic activity in the State. *Id.* at 185. The Wholesalers' Tax does precisely that.

Ford argues that because the Wholesalers' Tax is an activities tax, not a transaction tax, formula apportionment measured by wholesaling activities must be used. Ford also wrongly argues that the Delaware court treated the Wholesalers' Tax as a transaction or sales tax. Ford's argument ignores that the definition of taxable gross receipts in 30 Del. C. §2901(4)b is functionally equivalent to a single factor apportionment formula, based on sales and using a destination test[1] and that it is, therefore, externally

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[1] An example illustrates the equivalence. Assume Delaware wholesale gross receipts under the 30 Del. C. §2901(4)b destination test of $20. Under a *Moorman*-style single sales factor apportionment formula which uses a destination test to apportion gross receipts by formula, the result is the same. Assume that total wholesale gross receipts of the taxpayer are $300. A single sales factor apportionment formula would operate as follows: ($20 Delaware gross receipts ÷ $300 total gross receipts) x ($300 total gross receipts) = $20 apportioned to Delaware under the formula.

consistent in accordance with the holding in *Moorman*. This Court has held that both gross receipts taxes using a destination test and income taxes using a single sales factor apportionment formula based on a destination test are fairly apportioned and has noted the similarity between the two taxes. *See Tyler Pipe*, 483 U.S. 232, 251 (1987), *vacating and remanding on another point*, 715 P.2d 123 (Wash. 1986) (gross receipts tax using destination test); *Moorman*, 437 U.S. 267, 280-281 (1978) (income tax using single sales factor, destination test).

The reason underlying the *Moorman* court's decision was that Iowa sales were a reasonable representational factor for activity in Iowa and thus for dividing the income earned in that State. It found no proof that the other factors argued for contributed to the generation of income and that sales did not. *Moorman*, 437 U.S. at 272. Ford ignores sales entirely as a factor in generating income. The Court in *Trinova Corporation v. Michigan Department of Treasury*, 498 U.S. 358 (1991), rejected a similar argument that sales added nothing to the taxable value under Michigan's value added tax. *Id.* at 382. As this Court found in *Moorman*, analytically, formula based apportionment based on the ratio of locally destined sales to all sales is indistinguishable from using gross receipts from goods physically delivered in a state as the tax base. In either case, the income apportioned by sales or the gross receipts from State-destined sales represent wholesaling activity in the taxing State, which provides the

market that makes the sales possible in the first place.

So also, in this case, Delaware destination sales are a reasonable measure of Ford's wholesaling activities and income generation in Delaware and thus are "externally consistent." Ford engages in the variety of activities that are comprised in the activity of wholesaling in various states and that are designed to increase its wholesale sales in all states, but it clearly has its district and zone managers visit Delaware regularly to stimulate dealer sales in Delaware; its national advertising and sales incentive campaigns are, in part, directed toward increasing its Delaware market; it permits use of strictly regulated signage and its trademarks to promote Delaware sales and it controls a complicated logistics process to make delivery of undamaged vehicles to its Delaware dealers, and ultimately, their buyers. All of these activities are aimed at exploiting the Delaware market for Ford's products. Gross receipts realized in a market provided by Delaware are a reasonable factor to represent this Delaware wholesaling activity.

Moreover, nine years after *Moorman,* and citing that case with approval, this Court found that a gross receipts tax that is analytically indistinguishable from Delaware's was fairly apportioned under the Commerce Clause. In *Tyler Pipe*, 483 U.S. 232 (1987), *vacating and remanding on another point,* 715 P.2d

123 (Wash. 1986), the Court found on analogous facts that a destination test gross receipts tax[2] imposed on the activity of wholesaling and measured by a percentage of gross proceeds from sales at wholesale in the State complied with the requirement of the Commerce Clause. In that case, the taxpayer was headquartered outside of Washington, had no officers or employees in Washington, manufactured all products outside of the state and shipped them to customers from out of state. 483 U.S. at 249; *see also* 715 P.2d at 124-125. As in this case, the taxpayer's regional sales management and marketing division employees were located outside of the taxing jurisdiction, Washington. 483 U.S. at 249; *see also* 715 P.2d at 125. The taxpayer used independent manufacturer's representatives based in Washington, not its own employees, to market its products at wholesale. 483 U.S. at 249; *see also* 715 P.2d at 125. Ford argues that *Tyler Pipe* is factually distinguishable because all wholesaling activity took place in Washington; however, the facts recited above belie that assertion. The facts in *Tyler Pipe* are, in all salient points, identical to the facts in this case. In both cases, sales management outside of the taxing

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[2] The Washington tax defines sales producing taxable gross receipts as "any transfer of the ownership of, title to, or possession of property for a valuable consideration." Wash. Rev. Code §82.04.040(1). Since at least 1947, Washington has interpreted this statute as establishing a destination test. Wash. Admin. Code §458-20-103 (2008); *see also Ford Motor Company*, 963 A.2d at 121 n.28 (Petitioner's App. 11a, n.28).

state directed continuous, regular and substantial wholesaling activities conducted in the taxing state, in *Tyler Pipe* by independent sales representatives and in this case by Ford employees sent into Delaware to meet with dealers.

The Court found that the tax was fairly apportioned because it considered the portion of the wholesaling activity represented by the gross receipts from in-state sales as having occurred wholly within Washington. *Tyler Pipe*, 483 U.S. at 251 ("[T]he activity of wholesaling – whether by an in-state or an out-of-state manufacturer – must be viewed as a separate activity conducted wholly with Washington that no other state has jurisdiction to tax"). In reaching its conclusion, the Court relied on *Moorman*, in which it had equated a constitutionally acceptable single factor apportionment formula based on a sales destination test with a destination-based gross receipts tax for purposes of the fair apportionment test. *Tyler Pipe,* 483 U.S. at 251. It also relied on *Standard Pressed Steel*, 419 U.S. 560 (1975), which pre-dated *Complete Auto Transit* but which held that a wholesale gross receipts tax on gross receipts from sales to a local customer was "perfectly apportioned to the activities taxed." 419 U.S. at 564. Ford mischaracterizes the *Tyler Pipe* case as focusing solely on the relationship between the activities of manufacturing and wholesaling. This is true in the portion of the opinion discussing discrimination under the Commerce Clause. 483 U.S. at 239-248. It is not true of the portion of the opinion focusing on fair

apportionment. *Id.* at 251. There the Court examined only the activity of wholesaling. *Id.*

In summary, the Delaware court's decision in the case below is entirely consistent with this Court's fair apportionment decisions pertaining both specifically to gross receipts taxes and to income taxes more generally. The Delaware tax uses gross receipts from sales of Delaware destined goods as a measure of Delaware activity and seeks to tax only those gross receipts. Accordingly, review by this Court is unnecessary.

II. Review Is Not Necessary, Because The Decision Of The Delaware Court Does Not Conflict With The Decisions Of Other State Courts.

The cases decided by the courts in other States cited by Ford are completely reconcilable with the holding of the Delaware court in this case. In those cases, the statute or ordinance sought to tax the entire tax base from an activity, whether produced inside or outside of the taxing jurisdiction. In this case, Delaware's Wholesalers' Tax taxes only gross receipts from sales of goods physically delivered to the purchaser in Delaware, and does not purport to reach sales of goods physically delivered outside of Delaware. It is this crucial distinction in the division of the tax base that Ford's discussion of the cases decided in other States fails to address.

In *Northwood Construction Company v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004), *cert. denied*, 544 U.S. 962 (2005), a township sought to tax gross receipts of a taxpayer headquartered there, but whose gross receipts derived in large part from construction services provided at construction sites outside of Pennsylvania. Under the facts of the case, no apportionment or other division of the tax base whatsoever was available. The Pennsylvania Supreme Court held that the ordinance's failure to make any effort to divide the gross receipts tax base caused the tax to fail the external consistency test and thus the fair apportionment requirement of *Complete Auto Transit*. *Id.*, 856 A.2d at 803-804. The court held that attributing 100 percent of the taxpayer's total gross receipts from all sources to the taxing jurisdiction was "'out of all appropriate proportion to' the business transacted in the Township and has 'no rational relationship' to [the taxpayer's] business in the Township." *Id.* at 803 (*quoting Hunt-Wesson, Inc. v. Franchise Tax Bd. of California*, 528 U.S. 458, 464 (2000) and *Jefferson Lines*, 514 U.S. at 185 (1995)). Thus, on the facts before it, the Pennsylvania Supreme Court held only that a complete failure to divide the gross receipts tax base failed the external consistency test. In this case, the Wholesalers' Tax only reaches Ford's wholesale gross receipts from goods sold and physically delivered by Ford to its Delaware dealers and does not seek to tax gross receipts from goods sold and physically delivered to purchasers outside of Delaware. Thus, unlike in the *Northwood* case, the gross receipts tax base is

divided according to wholesale activity in Delaware and elsewhere, as measured by the statute's destination test. The holdings of the Delaware court in this case and the Pennsylvania court in *Northwood* are in accord.

Similarly, the tax at issue in another Pennsylvania case, *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003), suffered from the same defect as the tax in *Northwood*. In that case, Philadelphia sought to tax all of the gross receipts of the Philadelphia Eagles football team constituting "media receipts" for live telecasts of football games, half of which the team played outside of Philadelphia. The city's business privilege tax treated the media receipts as copyright royalties and allocated all such royalties to the taxpayer's commercial domicile, which was the city. *Id.* at 113; *see also* City of Philadelphia Business Privilege Tax Regulations §322.[3] Thus, as in the *Northwood* case, the tax at issue made no division of the gross receipts tax base at issue whatsoever, notwithstanding that half of the games giving rise to the team's media

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[3] Notably, the city uses the same "destination test" rule as the Wholesalers' Tax for dividing the gross receipts tax base from sales of personal property. City of Philadelphia Business Privilege Tax Regulations §304. The Pennsylvania court also noted that the city similarly taxes only gross receipts from services performed within the city limits, not outside of the city limits. *Philadelphia Eagles*, 823 A.2d at 117 n.9 (*citing* Philadelphia Code §19-2601; *see also* City of Philadelphia Business Privilege Tax Regulations §310).

receipts were played outside of the taxing jurisdiction. Accordingly, the court held that the taxpayer carried its burden of proving by clear and cogent evidence that the city's levy on 100% of the media receipts was inherently arbitrary and had no rational relationship to the club's activity in Philadelphia. *Philadelphia Eagles*, 823 A.2d at 132. The *Philadelphia Eagles* case stands only for the proposition that a complete failure to divide the gross receipts tax base failed the external consistency test. In this case, as pointed out above, Delaware's Wholesalers' Tax does not tax all gross receipts from all wholesale sales, wherever made, but rather taxes only gross receipts from wholesale sales of goods physically delivered to the buyer in Delaware. Thus, there is no conflict between the holding of the Pennsylvania Supreme Court in *Philadelphia Eagles* and the Delaware court in this case.

Ford also cites *City of Winchester v. American Woodmark Corporation*, 471 S.E.2d 495 (Va. 1996). As in the *Northwood* and *Philadelphia Eagles* cases, there is no conflict with the Delaware court's decision in this case. The gross receipts tax at issue in *American Woodmark* permitted no division of the tax base at all. Instead, the tax attributed to the city, which was the location of the taxpayer's corporate headquarters, 100% of the taxpayer's total gross receipts, although the taxpayer operated manufacturing, warehousing and distribution facilities in thirteen States. The Virginia court found that "[b]y definition, assessments based on 100% of American

Woodmark's revenues included revenues realized from value produced in locations other than the taxing jurisdiction." *Id.* at 498. Accordingly, the Virginia court held that the taxpayer met its burden of proof and that the tax was not fairly apportioned because it failed the external consistency test. *Id.* at 498. As do the *Northwood* and *Philadelphia Eagles* cases, *American Woodmark* stands only for the proposition that a complete failure to divide the gross receipts tax base failed the external consistency test. In this case, in contrast, Delaware seeks to tax only gross receipts from wholesale sales of goods delivered to Delaware retailers and does not tax gross receipts from sales of goods delivered outside of the State. Thus, the Delaware court's decision in this case is consistent with the Supreme Court of Virginia's decision in *American Woodmark*.

Ford also cites *Northwest Energetic Services, LLC v. California Franchise Tax Board*, 159 Cal. App. 4th 841 (Cal. App. 2008). In that case, as in the *Northwood, Philadelphia Eagles* and *American Woodmark* cases, a tax was imposed on the taxpayer's worldwide income wherever earned without any apportionment or other method of dividing the tax base. The taxpayer in that case was an LLC formed under Washington law that merely registered to do business with the California Secretary of State but that in fact carried on no business activities in California. *Id.* at 849. The California Court of Appeal held that the tax was unfairly apportioned because it was *both* internally and externally inconsistent. *Id.* at 862-864.

Again, there is no conflict between this case and the decision of the Delaware court; the Wholesalers' Tax is both internally and externally consistent, because it purports to tax only the gross receipts produced by sales of goods delivered in Delaware.

The same problem exists with Ford's reliance on *General Motors Corporation v. City of Kansas City*, 1994 WL 49620 (Mo. Ct. App. 1994), *vacated,* 895 S.W.2d 59 (Mo. Ct. App. 1995), *cert. denied,* 516 U.S. 909 (1995). In that case a gross receipts tax on manufacturing taxed the entire value of automobiles manufactured in Kansas City, although most of the parts assembled into automobiles were manufactured elsewhere. Thus, again, no provision for division of the tax base existed.

Ford also cites *General Motors Corporation v. City and County of Denver,* 990 P.2d 59 (Colo. 1999). That case is wholly inapposite, because the tax in question was a use tax, not a gross receipts tax. In its Petition Ford cites *Jefferson Lines*, 514 U.S. 175, 186-190 (1995) for the proposition that apportionment in the context of a gross receipts tax must take into account the location where revenue is generated. As discussed above in argument I, the destination test of the Wholesalers' Tax represents such an allocation.

Finally, Ford cites *Southern Pacific Transportation Company, Inc. v. Arizona Dept. of Revenue*, 44 P.3d 1006 (Ariz. 2002), as in conflict with the decision of the Delaware court. That case, like the *Philadelphia Eagles* case, taxed gross receipts derived from

transportation services performed in more than one State. The Arizona intermediate appellate court, relying on *Jefferson Lines*, held that the Arizona tax was not externally consistent and required mileage apportionment. The Wholesalers' Tax, in contrast, taxes only gross receipts from wholesale sales of goods delivered in Delaware and nowhere else.

The decision of the Delaware court is also in harmony with the recent decisions of the Supreme Courts of Washington and Hawai'i in *Ford Motor Company v. City of Seattle*, 156 P.3d 185 (Wash. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1224 (2008), and *Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804 (2004). The *City of Seattle* case is most closely on point. As in this case, the taxes in issue were on gross receipts from wholesale sales. *City of Seattle*, 156 P.3d at 188. Ford had no offices in two Washington cities that imposed gross receipts taxes based on wholesale sales to dealers in the cities, but, as in Delaware, Ford sent its representatives into the cities to conduct wholesaling activity. *Id.* at 187. As in this case, the gross receipts in issue were those derived from the sale of goods delivered into the taxing jurisdictions. *Id.* at 191. As here, Ford's activities within the taxing jurisdictions created the opportunity for the sales; thus, the gross receipts were derived from Ford's wholesaling activity. *Id.* at 192. The Washington court held that the cities' taxes, like the Washington B&O tax at issue in *Tyler Pipe*, were both internally and externally consistent because wholesale sales to retailers in the cities was an

activity viewed as occurring only within the cities and inherently apportioned; accordingly, taxation of the gross receipts from wholesale sales of goods delivered in the cities did not reach extraterritorial value. *Id.* at 193-194.

The Court of Appeals of Washington also determined that Seattle's gross receipts tax on wholesaling is fairly apportioned in *General Motors Corporation v. City of Seattle*, 25 P.3d 1022 (Wash. Ct. App. 2001), *review denied,* 84 P.3d 1230 (Wash. 2001), *cert. denied,* 535 U.S. 1056 (2002). In that case General Motors had no offices or employees in Seattle, but sent sales, service and parts representatives into the city to call on dealers on a monthly basis. *Id.* at 1024. Notably, it did not even solicit dealer orders in the city. *Id.* It also directed national advertising at Seattle and required dealers to perform warranty work on General Motors products. *Id.* at 1024-25. As in the *City of Seattle* case discussed above the tax was a gross receipts tax on wholesale sales of automobiles to dealers in the city. The Washington court held that the tax was internally consistent, because it taxed only gross receipts from Seattle-destined wholesale sales. *Id.* at 1030. The court rejected General Motors' argument that the tax was not externally consistent based on marketing activities' occurring both in Washington and in Michigan. *Id.* at 1030-31. The Washington court relied on this Court's holding in *Tyler Pipe,* 483 U.S. 232 (1987), that wholesaling activity with respect to sales within a state occur in the state of the sale. *General Motors*, 25 P.3d at 1031.

It also rejected the taxpayer's arguments that that this Court questioned the *Tyler Pipe* reasoning in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), or that the *Jefferson Lines* case held or implied that apportionment based on marketing activity was required. *General Motors*, 25 P.3d at 1032. Both the Supreme Court of Washington and this Court declined to review the decision in the *General Motors* case. The reasoning in this case and the case before the Court are in accord.

The Supreme Court of Hawai'i also sustained a gross receipts tax on the privilege of selling tangible personal property against a Commerce Clause challenge in *Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804 (Haw. 2004). In that case the taxpayer had no office, real property or employees in Hawai'i. *Id.* at 806-807. It sent employees into the state from time to time to engage in sales activities. *Id.* at 807-808. It shipped all goods to customers in Hawai'i F.O.B. shipping point on the mainland; thus, title passed to the Hawai'i customers outside of the state. *Id.* at 807. The tax was an activities tax for the privilege of "engaging or continuing to engage in the business of selling any tangible personal property whatsoever" at a percentage of "gross proceeds of sales" of tangible personal property. *Id.* (quoting Haw. Rev. Stat. §237-13(2)). The Hawai'i court found the tax to be fairly apportioned. It held that the tax was internally consistent because it reached only gross receipts from the sale of goods to customers located in Hawai'i. *Id.* at 816-817. The court found that Hawai'i

limited its taxing power to sales made to local customers and did not seek to tax sales made to customers outside of the state; thus, only the local component was taxed and only that portion of interstate revenues reasonably reflecting the in-state component of the taxed activity were reached. *Id.* at 817.

In summary, all of the cases cited by Ford can be reconciled with the decision of the Delaware court in this case. Although the conclusions differed, because the facts were different in different cases, the courts in all of the cases that Ford cites applied the same principles from this Court's cases that the Delaware court applied in this case. Accordingly, there is no reason to review this case.

III. Review Is Not Necessary On the Grounds Of Potential Multiple Taxation, Because That Potential Is Not Constitutionally Significant In This Case.

Ford argues in its Petition that the mere possibility of some level of multiple taxation serves to render the Wholesalers' Tax not fairly apportioned. This argument mischaracterizes this Court's jurisprudence on this point. In applying the external consistency test of fair apportionment, the Court recognizes that different methods of dividing the tax base may result in some permissible risk or actual level of multiple taxation. *Jefferson Lines,* 514 U.S. at

187-188; *Container Corporation*, 463 U.S. at 169-170; *see also Moorman*, 437 U.S. at 277-278. Ford actually argues that the Court should do what it has often refused to do: prescribe a single acceptable method of dividing the tax base.

Some "overlap" in different methods of dividing the tax base is consistent with the recognized principle that States enjoy wide latitude in determining how to divide the tax base to achieve external consistency and fair apportionment, and this Court has accordingly refused to require a particular method of apportionment. *Moorman*, 437 U.S. 267, 274 (1978); *accord Jefferson Lines,* 514 U.S. at 195; *Goldberg*, 488 U.S. at 261; *Container Corporation*, 463 U.S. 159, 164 (1983). For example, in *Moorman* this Court noted that overlap in taxation might occur even if the apportionment system were ostensibly identical, because definitions might differ. *Moorman*, 437 U.S. at 238 n.13 (noting that different definitions of what constitutes a sale could lead to inclusion of the same sale in different States' apportionment formulas). The Delaware court recognized this as well. *Ford Motor Company*, 963 A.2d at 122 (Petitioner's App. 15a). Similarly, in *Jefferson Lines*, this Court recognized that a succession of taxes by different states on distinct events was permissible. *Jefferson Lines,* 514 U.S. at 187-188, 192 (succession of taxes on distinct events in the chain of commerce; gross receipts tax on out of state portion of bus travel at issue). This Court has held, citing *Moorman*, that "multiple taxation placed upon interstate commerce

by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the accidental incident of interstate commerce being subject to two different taxing jurisdictions." *Jefferson Lines*, 514 U.S. at 192 (internal quotations omitted). The tax survives external consistency analysis, unless the taxpayer shows that there is no rational relationship between the tax measure attributed to the state and the contribution of local business activity to the entire value. *Trinova*, 498 U.S. at 380 (1991). Ford has made no such showing here.

The Delaware court followed these principles in rejecting Ford's multiple taxation argument. In the Petition, as it did below, Ford argues for the very sort of judicial lawmaking to prescribe a specific method of dividing the gross receipts tax base that this Court rejected in *Goldberg* and *Moorman*. *Goldberg*, 488 U.S. at 261; *Moorman*, 437 U.S. at 278. In order to avoid all duplicative taxation, this Court would need to prescribe a single method of dividing the gross receipts tax base, contrary to its expressed refusal to do so. The Delaware court recognized this as well and rejected the argument. *Ford Motor Company*, 963 A.2d at 120 (Petitioner's App. 10a).

Ford raises the specter of 1,200 taxing jurisdictions all enacting differing statutes. Yet it has presented no evidence that this has happened. On closer examination, this is merely the same argument that this Court should prescribe a single method of dividing the gross receipts tax base. As pointed out above, this is something that the Court has refused to

do, holding instead that the Constitution commits policy decisions such as the promulgation of a uniform apportionment or division rule to Congress, not this Court. *Moorman*, 437 U.S. at 280; *see also Quill Corporation v. North Dakota*, 504 U.S. 298, 318-319 (1992) (Congress may be better qualified to determine requirement of physical presence for substantial nexus and has the power to do so under the Commerce Clause).

This Court should not now, as requested by Ford, depart from long established precedent pertaining to fair apportionment in the context of gross receipts taxes on the sale of goods. In *Standard Pressed Steel*, almost 35 years ago, this Court held that a gross receipts tax like the one in issue was fairly apportioned. 419 U.S. 560, 564. In 1977, the Court simplified and distilled its dormant Commerce Clause jurisprudence in *Complete Auto Transit,* approved the single sales factor apportionment formula in *Moorman* the next year and reiterated its *Standard Pressed Steel* conclusion in *Tyler Pipe* in 1987, relying also on *Moorman*. The concern for continuity, predictability and stability in the law should lead the Court to adhere to settled precedent. *Quill Corporation*, 504 U.S. 298, 317 (1992).

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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